

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ALLIED CONTAINER,)	
)	
Appellant, Employer below,)	
)	
v.)	C.A. No. 04A-12-010-JRS
)	
LORETTA LEGG,)	
)	
Appellee, Employee below.)	

Date Submitted: May 5, 2006
Date Decided: August 28, 2006

*Upon Consideration of Appeal
From the Industrial Accident Board.*
AFFIRMED.

ORDER

This 28th day of August, 2006, upon consideration of the appeal filed by Allied Container from the decision of the Industrial Accident Board denying Allied's Petition to Terminate Total Disability Benefits being paid to Loretta Legg, it appears to the Court that:

1. In January 1992, Loretta Legg ("Legg") suffered a compensable injury when she slipped and fell while working at Allied Container ("Allied"). She

sustained a severe sprain in her right ankle, and shortly thereafter was diagnosed with Reflex Sympathetic Dystrophy (“RSD”), a pain syndrome. She received total temporary disability benefits and was granted a 50-percent permanent impairment to the right lower extremity.¹

2. In April 2003, the Industrial Accident Board (“Board”) granted Legg’s petition for a recurrence of total disability. In 2004, Allied sought to terminate the disability benefits, but the Board denied the termination petition.

3. In December 2004, Allied filed a timely notice of appeal to this Court. Settlement attempts, which prolonged the filing of briefs, were unsuccessful. Briefing is now complete and the issues are ripe for decision.

4. The record shows that three witnesses testified at the Board hearing on November 19, 2004. Wilhelmina C. Korevaar, M.D., testified by deposition on behalf of Allied. Eugene Daniello, a private investigator, also testified on Allied’s behalf. Legg testified on her own behalf.

5. Dr. Korevaar, a specialist in anesthesiology and pain medicine, was the first witness.² She examined Legg on two occasions prior to the 2003 hearing and

¹The Court’s summary of the posture of the case is gleaned from the Board’s decision. *See* Docket Item (“D.I.”) 3, Board Decision, *Legg v. Allied Container*, IAB Hrg. No. 956868 (Dec. 3, 2004).

²Dr. Korevaar’s deposition testimony is found in the transcript of the Board hearing. *See id.*, Hr’g Tr., at 8-26.

again on March 9, 2004, in preparation for the hearing on the motion to terminate. According to Dr. Korevaar, Legg appeared at the appointment wearing a knee brace on her left forearm over her sweatshirt and a wrist splint. She wore braces over her jeans on both legs. She carried a four-pronged cane but did not lean on it and did not limp. She said that her primary complaints were pain in the right leg and left upper extremity, although her left leg also bothered her. She reported being unpleasantly sensitive to cold temperatures. Her treating physician had prescribed numerous narcotic pain relievers for her, including Actiq, which is typically prescribed for patients with terminal cancer who are experiencing severe breakthrough pain. Dr. Korevaar stated that the medical records from two physicians treating Legg did not reflect any improvement in her condition.

6. Dr. Korevaar observed that although a person with RSD may be sensitive to cold in the afflicted areas of the body, Legg's overall sensitivity was more consistent with weight loss, which Legg had recently experienced. Dr. Korevaar also testified that Legg showed no signs of being in pain and moved without difficulty. The doctor had reviewed surveillance tapes prepared by Eugene Daniello, an investigator hired by Allied. Dr. Korevaar stated that Legg's activities were not consistent with someone suffering from RSD. She considered Legg's use of the braces to be a form of symptom magnification. The doctor observed a nasal erosion

that she thought could be caused only by sticking something into the nose or by snorting drugs such as cocaine. She saw no reason for Legg to be taking narcotic pain relievers and, in fact, found that Legg did not exhibit the typical side-effects of such medications, such as constipation.

7. In Dr. Korevaar's opinion, Legg had fully recovered from her right ankle injury and from RSD. Dr. Korevaar found that the ongoing provision of medications was not reasonable, necessary or related to the work injury. The doctor found that Legg was capable of returning to work in her pre-injury capacity, with certain restrictions on heavy lifting. These findings were similar to her findings in July 2002.

8. Eugene Daniello, a private investigator with the firm of Richardson and Associates, also testified on behalf of Allied.³ His firm was hired by Allied to conduct surveillance on Legg, and the case was assigned to Mr. Daniello. He testified that he conducted surveillance of Legg for a total of 36 hours spread over five days in 2003 – August 22 and 29, November 26, and December 1 and 9. Mr. Daniello wrote two reports, which were entered into evidence, as were the two videotapes he had taken. He testified that on August 29 and November 26, 2003, Legg did not leave her home in Claymont, Delaware.

³*See id.* at 27-42.

9. According to Mr. Daniello, on August 22, 2003, Legg came out of her house and carried some boxes to the car. She drove to the bank and then to a store where she carried in the boxes she had brought from home. She carried her cane but did not use it. She shopped at a sidewalk sale for one hour and six minutes. She wore a brace on her left arm and her right lower leg, but she showed no signs of infirmity; she did not use her cane, although she carried it. She used her left hand to sort through merchandise and she walked without any sign of impairment. She drove home when she was finished shopping.

10. On December 1, 2003, Mr. Daniello observed Legg drive to a bank and to a shopping center. She had three passengers, two adult women and a small child. Legg carried the child into a store and later left the store carrying two large shopping bags in her right hand and a smaller bag and cane in her left hand. One of the other women drove back to Legg's home. Legg carried several bags into the house, holding her cane in her right hand.

11. Mr. Daniello reported that on December 9, 2003, Legg drove to her daughter's home in Marcus Hook, Pennsylvania, and then drove to a medical complex in Jenkintown, Pennsylvania. While driving in Philadelphia, she tapped the fender of another car, but no damage was done and the parties amicably left the scene. Legg

next drove to the Target store on Route 202 in Wilmington, Delaware and then went home.

12. Legg was the final witness.⁴ She testified that she had surgery on her right foot in March 1995 and had two nerve stimulators implanted in her spine prior to 2001. One stimulator is for the upper extremities and the other one is for the lower extremities. They have been helpful in reducing and managing her pain. She has had numerous nerve blocks as well.

13. Legg testified that her condition has improved somewhat since the hearing in April 2002, but she still experiences ongoing pain in her right leg. She also has problems with her left arm, but her left leg is somewhat better and her right arm is fine. Her pain levels vary, and on bad days she does not leave the house but simply rests on the couch. On good days, she sometimes feels similar to how she felt before the injury, but she never knows when she will have a good day. She experiences somewhat less pain in warm weather and is very sensitive to cold temperatures.

14. Legg was questioned extensively about the activities observed on the two surveillance tapes. She stated that her daughter usually drives her to her doctor appointments, but Legg drove herself on December 9 because her daughter was not

⁴*See id.* at 44–94.

feeling well. She was nervous about driving because she had taken her medications, which caused her to have a very minor car accident in Philadelphia, as seen on the video. When she drives she uses only her left foot on the pedals, which is difficult. She is left-hand dominant but uses her right arm more than she used to. She carries her cane but does not always need it because she wears splints, which hurt her legs if touched. She wears the wrist splint even when she goes to sleep. She and her husband no longer sleep in the same bed because he may accidentally hit or bump her in the night. Her son cleans the house and does the dishes and the laundry.

15. Legg further testified that she does not take the prescribed narcotic Actiq anymore because her husband's health insurance stopped paying for it. The Actiq effectively reduced her pain but made her sleepy. Her other prescriptions are covered by her husband's medical insurance.

16. On December 3, 2004, the Board issued its decision denying the petition to terminate because Allied had not carried its burden of proof to show that Legg is no longer totally disabled.⁵ In reviewing the evidence, the Board found that the sole medical witness, Dr. Korevaar, was neither objective nor credible in her assessment of Legg's condition. This conclusion was based in part on the doctor's thinly veiled suggestions that Legg may have been swapping her prescription painkillers for

⁵*See id.*, Board Decision.

cocaine, which caused the nasal erosion. The Board repeatedly noted that there was simply no evidence to support such a notion and that the doctor's references cast her objectivity into doubt. Because of the total lack of evidence of illegal drug use, the Board rejected the doctor's assertion that she was concerned about the health consequences if Legg was mixing her medications with illegal substances. In regard to Legg's lack of constipation as showing that she was not taking the prescribed medication, the Board found this assertion to be inadequate and unsupported.

17. Similarly, the Board found that the Physical Capabilities Form completed by Dr. Korevaar was unreliable in light of Legg's 50 percent permanent impairment of the right leg. The doctor indicated that Legg could sit, stand, walk, bend, kneel, squat and climb. She placed limits on lifting and carrying but stated that there was no limit on pushing or pulling. The Board found these statements to be "utterly inconsistent" with the leg impairment established earlier in the case.⁶

18. In contrast, the Board found Legg to be a credible witness, as it had at the previous hearing. The Board accepted Legg's testimony that she had good days and bad days, and that on good days she feels almost as she did prior to the injury. Factually, the Board noted that Legg wore splints even when she was under surveillance, that she rented a wheelchair while on vacation and that she carried the

⁶*Id.* at 16.

child in her right arm even though she is left-hand dominant. To accept Dr. Korevaar's opinion that Legg was completely recovered, the Board would have had to find that Legg was conducting a "fairly elaborate charade," of which the Board found no evidence whatsoever.⁷

19. Following the first hearing in 2002, the Board rejected Dr. Korevaar's opinion that Legg had completely recovered from her injury and did not suffer from RSD. The Board found instead that Legg had RSD in both her lower extremities and in her left upper extremity. It reiterated that finding in the 2004 decision in light of Legg's credible testimony and the fact that Dr. Korevaar repeated her previous opinion. The Board ultimately denied Allied's petition to terminate benefits.

20. On appeal to this Court, Allied argues first that the Board "disliked"⁸ Dr. Korevaar for her suggestions of illegal drug use and that the Board erred in rejecting her uncontradicted opinion. Allied also argues that the Board abused its discretion when it found Legg to be credible because there was no substantial evidence to support the credibility determination. Legg responds that the Board considered all the evidence in reaching its decision and that credibility determinations are solely within the province of the Board. Legg also asserts that there was no abuse of

⁷*Id.* at 14.

⁸D.I. 7, Allied's Opening Br., at 9.

discretion and no error of law.

21. In reviewing a decision of the Board, the Court must determine whether the decision is supported by substantial evidence and is free from legal error.⁹ “Substantial evidence” is relevant evidence that a reasonable person might accept as adequate to support a conclusion.¹⁰ The Court may overturn the Board’s decision only when there is no substantial, competent evidence of record to support it.¹¹ It is not the Court’s function to weigh the evidence, determine credibility of the witnesses or make factual findings.¹² The Court may not reverse the Board even if it might have reached a different conclusion if presented with the same evidence in the first instance.¹³

22. Allied relies on *Pusey v. Natkin & Co.*¹⁴ to support its argument that the Board erred in rejecting Dr. Korevaar’s opinion. In *Pusey*, the Delaware Supreme Court held that the Board could not ignore unrebutted medical evidence pertaining to the date when a permanent impairment first becomes fixed because a permanency

⁹*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

¹⁰*Histed v. E.I. du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

¹¹*Johnson*, 213 A.2d at 66.

¹²*Id.*

¹³*Diamond Materials v. Manganaro*, 1999 WL 1611274, at *2 (Del. Super. Ct. Apr. 8, 1999).

¹⁴428 A.2d 1155 (Del. 1981).

determination is a “medical question to be decided on the basis of expert medical testimony.”¹⁵ However, in determining whether a person is disabled for purposes of workers’ compensation, the Board is required by statute to “give full consideration to all evidence presented,”¹⁶ not only medical evidence.

23. In this case, the Board found in 2003 that Legg was totally disabled because of RSD based on her testimony as well as the expert testimony of her treating physician, Dr. Steven M. Rosen, a specialist in anesthesia and pain management. On Allied’s 2004 petition to terminate benefits, Allied presented medical expert testimony, but that testimony was not based on objective test results because no such test exists for diagnosis of RSD. Dr. Korevaar looked for signs of muscular atrophy, skin sensitivity, limited range of motion and abnormal growth of the fingernails. She testified that these factors are associated with RSD but did not say that their absence is determinative. Legg relied on the established fact of her 50-percent permanent impairment of the right leg, her medical records of multiple nerve blocks and two spinal implants, as well as her account of ongoing pain and hypersensitivity to cold temperatures, which the Board found to be credible. The Court, therefore, concludes that there is substantial evidence to support the Board’s factual findings and that the

¹⁵*Id.* at 1157.

¹⁶DEL. CODE ANN. tit. 19, § 2348(I) (2005).

Board did not err in its finding that Dr. Korevaar was not credible.

24. Allied also argues that the Board abused its discretion when it found Legg to be credible because there was no substantial evidence to support the credibility determination. The foundation of the Board's decision is its finding that Legg was a credible witness, who described severe, ongoing pain, adequately demonstrated by the splints she wears and a wheelchair she used while on vacation. Accepting Legg's testimony in turn cast doubt on Dr. Korevaar's opinion, which was not based on objective tests (since none exist for RSD) and which was further undermined by the doctor's unsupported and irrelevant suggestions that Legg was using illegal drugs. Assessing the credibility of witnesses and deriving inferences therefrom is solely within the province of the Board,¹⁷ and the Court is satisfied that the Board did not abuse its discretion in reaching its conclusions in this case.

25. Based on the foregoing, the decision of the Board denying Allied's petition to terminate total disability benefits is **AFFIRMED**.

IT IS SO ORDERED.

Original to Prothonotary

Judge Joseph R. Slights, III

¹⁷*Johnson*, 213 A.2d at 66.